United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

349

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

No. 23554

v.

SAMUEL A. SMITH, JR.

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUE PRESENTED

1. Whether the instructions taken as a whole unfairly minimize and obscure the appellant's defense of mistake, accident or inadvertence.

This case has not previously been before this Court.

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BRIEF FOR APPELLANT

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FOR THE DISTRICT OF COLUMBIA

No.

UNITED STATES OF AMERICA

v.

SAMUEL A. SMITH, JR.

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

I. Preliminary Statement

On January 12, 1968, at about 9:30 p.m. two Metropolitan Police Officers observed appellant apparently illegally parked in his automobile. They motioned him to move, whereupon he started his car, struck a car parked directly behind him, and with the police approaching on foot, alit from

his auto, throwing a bag or envelope as he did so. He claimed that a man with whom he had been conversing through his car window had, moments before, and with the police approaching, thrown the envelope into the car, whereupon he, the appellant, retrieved it and handed it to the police telling them that it was not his, but the other persons. Charged with two violations of the narcotic laws (having to do with the possession of forty caps of heroin), the defendant was tried by judge and jury and was found guilty on each count of the two-count indictment. He was sentenced to two-eight years on count one, and five years on count two, the sentences to run concurrently.

On this appeal, Smith challenges the proceedings below in two respects:

1. The trial judge erred in allowing the prosecutor to cross examine the defendant about privileged conversations with his attorney.

2. The trial judge erred in refusing instructions on the definition of possession in this case where the defendant was a "knowing" but essentially unwilling conduit.

II. The Dramatis Personae and The Evidence Relating to the Narcotics Charges

Sergeant John R. Driscoll, Metropolitan Police Department, assigned to the Tactical Division, testified that

on January 12, 1968, about 9:30 p.m., he was riding in a cruiser in the 1900 block of 14th Street, N. E., Washington, D. C., with his partner, Officer Anthony Segaria, he observed the appellant sitting in his automobile parked too close to the intersection of 14th Street and Wallach Place, N. E., Washington, D. C. They pulled abreast the appellant's car and motioned it to move on (Tr. 37) and at the same time observed the appellant, the driver, apparently talking to another man who was stooped down on the sidewalk talking into the passenger side window (Tr. 37). As the police approached, the man on the sidewalk left, walking at a normal pace, and the appellant got out of the driver's side of the car moments after his car had lurched backwards striking the bumper of the car behind. Sergeant Driscoll testified that as he got out, the appellant threw something which struck the car door and then tried to kick the object under the car (Tr. 38). Thereupon, Officer Segaria, at Driscoll's command retrieved the object which turned out to be an envelope containing forty capsules of heroin. Sergeant Driscoll further testified that he grappled with the defendant and arrested him. Again, on direct examination (Tr. 58-59) the Sergeant said that he knew the other man as one "Turkey" but had made no attempt to find him in connection with the instant case.

Officer Segaria testified in the government's case in chief that he too saw the other man at the car window in a low crouch (Tr. 114) and saw the appellant kicking at the envelope. On rebuttal, Sergeant Driscoll admitted that appellant, at the moment of his arrest claimed that someone else had put it in his car (Tr. 172).

Other police testified as to the custody and the content of the envelope; the heroin was thereupon admitted into evidence.

The appellant, testifying in his own behalf, testified that he was parking his car, his wife already having alighted from the vehicle, when he was approached, as he sat, still behind the wheel, by a man known only to him as "Turkey". (Tr. 129-130). "Turkey" questioned him through the passenger side window concerning the whereabouts of any possible narcotics; with the police now approaching, "Turkey" threw an article which landed on the front floor of the car. The appellant then retrieved the article and getting out of the driver's side at the command of the police, attempted to give the envelope to them, meanwhile telling them that another person had thrown the envelope into the car. He testified further that he asked the police to go after the man. (Tr. 150). Noteworthy is the fact that at a bench conference, the prosecuting attorney admitted

to the trial judge that "holding or flipping" the drugs or envelope (for another) would, according to him at least, be no illegal act. (Tr. 149).

The appellant's wife, Gloria Smith, corroborated the appellant's testimony that a man had been at the car window and that the appellant had protested to the police. One, Virginia Johnson, also testified that she had seen the man. (Tr. 154-162).

ARGUMENT

I. THE TRIAL JUDGE, WHILE PROPERLY INSTRUCTING THE JURY ON ACTUAL AND CONSTRUCTIVE POSSESSION, IMPROPERLY REFUSED APPELLANT'S REQUEST FOR AN INSTRUCTION THAT AMPLIFIED THE APPELLANT'S THEORY OF THE CASE, i.e. THAT HE WAS AN UNWILLING CONDUIT WHO HAD NO INTENT TO EXERCISE DOMINION OR CONTROL OVER THE ITEMS IN QUESTION.

Appellant was tried for violations of narcotic laws (26 U.S.C. 4704A and 21 U.S.C. 174) which in essence charged him with the knowing and intentional possession of a prohibited and illegal drug. The government's case consisted chiefly of the testimony of an experienced police sergeant who testified that he saw the appellant throw an object which turned out to be an envelope containing forty capsules of heroin. The record makes no mention of any direct evidence indicating that

the defendant knew that the envelope contained narcotics, save his own testimony that he was approached by the prior owner of the envelope who asked him the whereabouts of any narcotics. The appellant's theory was, therefore, that the other person had thrown the envelope into the car as the police approached, and that he, the appellant, was in the act, not of controlling, possessing or exercising control over, but rather attempting to rid himself of its presence. He claimed in essence, not that he did not knowingly and physically touch, handle or otherwise possess the contraband in question, but rather that his was a reflex action designed to divest himself of contraband. He claimed, again in essence, to be an unwitting, unwilling and otherwise innocent victim of circumstances, not of his own making. There is no evidence that he did or said anything that would indicate any intent to do otherwise. His argument on appeal is that the instructions given the jury are incomplete and misleading; that the trial judge improperly refused counsel's request for an instruction clearly spelling out the defenses of mistake, accident and/or inadvertence. It is his position further, that while instructions which are larded with examples of actual and constructive, and sole and joint possession, yet the very nature of his defense necessitated something further. He claims, in effect, that by emphasizing the defini-

tions of actual and constructive possession and practically ignoring the defenses of mistake, accident and inadvertence, the trial judge has misled and misguided the jury. It is his position further, that while the trial judge has properly instructed as to the government's burden of proof and the "prima facie" nature of a showing of possession, yet he maintains that the instructions do not properly instruct the jury as to what defenses are available to one who would attempt to rebut the prima facie evidence contained in the government's case against him. His attack on the instructions, therefore, is directed at the second element of the charge (Tr. 189), i.e. the "knowing" and "fraudulent" possession, so necessary to a conviction. True, the instructions (Tr. 191) properly refer to the chance of explanation which is available to a defendant, yet no guidelines, no examples, no amplification are given. Indeed, such is specifically refused. (Tr. 183-184). Counsel made it clear that the defense was that of accident, and he was told that abstract principles of law were all that was necessary. He claims now, as he claimed then, that merely to tell a jury that such defenses are available to him (Tr. 193) in a definition contained in a twenty-seven word paragraph, lost in some twenty-five pages of transcript, to give him the benefit of no examples, no homilies, no explanation or definition of

"mistake or accident", is to effectively signal a jury that that kind of a defense is hardly worth consideration. The appellant's claim is that he had a right to avoid possession--that he had a right to self-help, a right to snatch his hand out of the fire, a right to avoid that which is attributed to him. He claims that examples could and should have been given, that a jury properly understand that there must be a fraudulent intent.

The Handbook of Criminal Law Instructions, Junior Bar Association of the District of Columbia, 1966, in Instruction # 93 A & B, was incorporated into the instructions given by the trial judge. These instructions synopsize the law in the cases therein cited.

> Harris v. United States, 359 U.S. 19 (1959); Miller v. United States, ____U.S. App. D.C. ____, 347 F.2d 797 (1965); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962). cert denied, 371 U.S. 930 (1962); United States v. Santore, 290 F.2d 51 (2d Cir. 1959) cert. denied, 365 U.S. 834; Cromer v. United States, 78 U.S. App. D.C. 400, 142 F.2d 697 (1944) cert. denied, 322 U.S. 760; Bates v. United States, 95 U.S. App. D.C. 57,219 F.2d 30 (1955); Casey v. United States 276 U.S. 413 (1928); Killian v. United States, 58 U.S. App. D.C. 255, 29 F.2d 455 (1928); Goode v. United States, 80 U.S. App. D.C. 67,149 F.2d 377 (1945); Woolridge v. United States, 97 U.S. App. D.C. 67,228 F.2d 38 (1955), cert. denied, 351 U.S. 989.

Instruction #94 in the Handbook of Criminal Law Instructions, Junior Bar Association of the District of Columbia, 1966, sets out the element (#2) "that the defendant did so fraudulently and knowingly." Taken together, therefore, with the requirement of the exercise of dominion and control and the actual or constructive possession, it is appellant's argument that a specific intent to deceive is lacking in his case, and that the instructions as given unfairly de-emphasize or obscure his defense, i.e. a failure to deceive -- an unwilling act.

> "It is generally necessary to show that the defendant was aware of the presence and character of the particular substance and was intentionally and conspicuously in possession of it." 91 ALR 2nd 810. Also see Malloy v. United States, D. C. Mun. App. 246 A 2d 781 and Spriggs v. United States, 133 U.S. App. D.C. 76 (1969). Harris v. United States 359 U.S. (1959), State v. Giddings 352 P.2d 1003.

CONCLUSION

For the reasons stated, this Court should reverse the conviction. Depending on the basis for reversal, the District Court should be instructed to enter a judgment of acquittal or to order a new trial.

Respectfully submitted,

John H. Treanor, Jr.
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,554

UNITED STATES OF AMERICA, *Appellee*,

v.

SAMUEL SMITH, *Appellant*.

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES F. FLYNN,
Assistant United States Attorneys.

Cr. No. 363-68

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OTHER REFERENCES

21 U.S.C. § 174	1, 8
26 U.S.C. § 4704 (a)	1

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the instructions to the jury obscured appellant's defense of mistake, accident or inadvertence?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,554

UNITED STATES OF AMERICA, *Appellee,*

v.

SAMUEL SMITH, *Appellant.*

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 3, 1968, appellant was charged with possession of narcotics not in the original stamped package (26 U.S.C. § 4704 (a)) and illegal importation of narcotics (21 U.S.C. § 174). At a jury trial before the Honorable John J. Sirica on May 21 to 23, 1969, he was found guilty of both counts. On July 18, 1969, he was sentenced to concurrent terms of from two to eight years on the first count and five years on the second. This appeal followed.

The Government's Case

Sergeant John R. Driscoll testified that on January 12, 1968, at about 9:30 p.m., he and Officer Anthony Segaria were patrolling in the Thirteenth Precinct when they noticed a Cadillac on the southeast corner of 14th Street and

Wallach Place, N.W., parked illegally facing northbound on 14th Street. When the police cruiser pulled abreast of the vehicle, the driver of the car was conversing with a person who was standing on the passenger side of the car, stooping down to talk through the window. Officer Driscoll, on the passenger side of the police vehicle, motioned the driver to move out of the restricted parking zone, and the Cadillac lurched backward, the right rear wheel mounting the curb and the rear of the car striking the car parked behind it. The officer got out of his car just as the driver of the other car alighted "and made a swift motion with his left hand as he stepped back, tossing a small tan envelope which struck the outside top edge of the window of his car and then fell to the outside on the ground, on the street" (Tr. 35-37). The driver of the car was appellant. He then tried to kick the envelope under his car. Officer Segaria picked it up and found it to contain capsules, and Sergeant Driscoll arrested appellant (Tr. 38). Driscoll identified Government's Exhibit No. 1 as the envelope appellant had thrown and testified that no revenue stamps were affixed to it (Tr. 41).

Officer Segaria testified to the same events, adding that he had seen no revenue stamps on the envelope or the capsules. He turned the envelope over to Plainclothesman Andrew Johnson of the Narcotics Squad (Tr. 108). Officer Johnson identified Government's Exhibit No. 1 as the envelope which he had received from Officer Segaria on the evening of January 12, 1968, and had later delivered to a chemist, Mr. Steele (Tr. 120-121). Mr. John A. Steele, a chemist with the Internal Revenue Service Laboratory, testified that the capsules which he found in the envelope marked Government's Exhibit No. 1 contained a total of 1850 milligrams of white power. Twenty-six percent of the powder was heroin hydrochloride, a derivative of opium. Mr. Steele's qualifications in his field were stipulated (Tr. 123-125). The envelope and capsules were admitted into evidence (Tr. 125).

Defense and Rebuttal

Appellant testified in his own behalf that on the evening in question he was stopped, as the officers had testified, conversing with a man named Turkey, who was kneeling near the passenger side of his car. Turkey had asked whether appellant knew of anybody who had narcotics. When the officers drove up, Turkey became nervous "and that is when he jumped up from the side of my car and I seen him go in his pocket and when I looked again he left and I seen an envelope laying down on the floor of my car." At that time Officer Driscoll got out of his police cruiser and ordered appellant out of his car. He obeyed, and his car rolled backwards, striking the parked car. Appellant had the envelope in his hand, and the officer knocked it to the ground and arrested him (Tr. 129-131, 140). When Turkey saw the police, appellant testified, "that is when I seen him with this package in his hand and he tossed it as though he was trying to toss it under my car but it fell in my car" (Tr. 147). Appellant said that he had tried to get the policemen to chase Turkey. "If they would have gotten him when I told them to it would have been straightened out right then" (Tr. 150).

Mrs. Gloria Smith, appellant's wife, testified that on the night in question her husband dropped her off at 14th and T Streets, and she started to walk along T Street to the Blue Angel restaurant. Her husband drove another block to Wallach Place, where he stopped and began talking to someone on the sidewalk. She saw her husband get out of the car when the police came and noticed a bag in his hand, but she never mentioned seeing the bag or the envelope on the ground. She did hear her husband saying something to the police about the man who had been standing by the car (Tr. 154-157). Virginia Johnson, a friend of the Smiths, also testified that she had seen a man talking to Mr. Smith at the car before the police arrived (Tr. 163).

Sergeant Driscoll, testifying in rebuttal, stated that appellant had not accused Turkey at the time of his arrest, but

had said that "somebody . . . put it in my car and I am going to take care of him" (Tr. 172).

Instructions to the Jury

At a bench conference before final arguments, the trial judge read to counsel his usual instruction on the definition of possession, which included the sentence, "An act or failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident." Because "mere technical position [possession?]" was his defense, appellant requested an addition to the instruction, but he did not offer such an addition either orally or in writing. The trial judge denied the request, suggesting that counsel might argue the point to the jury (Tr. 182-184).

ARGUMENT

It was not necessary for the trial judge to give the jury a special instruction on appellant's theory of the case, since the instructions the court gave adequately directed the jury to find appellant not guilty if they accepted his version of the facts.

(Tr. 182-193)

Appellant's defense was that his friend Turkey had thrown the envelope of capsules into the car, whereupon appellant picked up the envelope.[1] The instructions to the jury presented them with two possible means of arriving at a verdict in favor of appellant if they believed his story.[2]

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[1] Appellant never explained why he picked up the envelope, knowing that the police were watching him. He did admit that he "kind of thought it was [narcotics]" (Tr. 150).

[2] It is no great surprise that the jury chose to disbelieve appellant, since his version of the facts was that Turkey was apparently looking for someone from whom to buy narcotics (Tr. 140), even though Turkey was already in possession of a large quantity of heroin in a 26% mixture, much greater purity than the usual "street" grade.

A. *"Knowing possession" was adequately defined to the jury, as was "knowingly facilitating the concealment or sale" of a narcotic drug.*[3]

The jury could not have found appellant to be in "knowing possession" of the narcotics if they accepted his version of the facts. They were instructed in connection with "possession" that:

> A person who *knowingly* has direct physical control over a thing at a given time is then said to be in actual possession of that certain thing, whatever he had control over.
>
> A person who although not in actual possession *knowingly* has both power and intention at a given time to exercise dominion and control over the thing either directly or through another person or persons is then said to be in constructive possession of it.
>
> • • • • •
>
> *Now an act or failure to act is knowingly done if it is done voluntarily and intentionally and not because of mistake or an accident, or inadvertence.* (Tr. 192-193) (emphasis added).[4]

In connection with the second count they were instructed that to find appellant guilty they must find:

> Second, that the defendant did so [facilitate the concealment or sale of a narcotic drug] *knowingly* or fradulently.
>
> • • • • •
>
> To establish the second essential element of the offense it is necesary that the defendant at the time he so facilitated the concealment or sale of a narcotic drug that he had done so fraudulently or *knowingly*. The intent which is the necessary part of the fraudulent act is the specific intent to deceive.

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[3] We note that in the trial court appellant's only contention was that the trial judge should explain to the jury more fully the meaning of mistaken or accidental possession (Tr. 183). His argument on appeal seems to be the same.

[4] This definition of "possession" applies to both counts of the indictment.

> If, however, the defendant in facilitating the concealment or sale of a narcotic drug specifically intended to deceive it is immaterial whether the government was in fact deceived or whether it in fact sustained any monetary loss. *An act is done knowingly if done voluntarily and purposely and not because of a mistake or an accident or by inadvertence.* (Tr. 189-190) (emphasis added).[5]

Thus the jury was clearly instructed that possession must be "knowing" possession, and that mistaken, accidental or inadvertent possession was not "knowing" possession. Similarly, facilitation of concealment or sale of a narcotic drug "knowingly" was clearly distinguished from a mistaken or accidental or inadvertent act. It is well settled that a request instruction need not be given if the matter in question is adequately covered in other instructions. *E.g., United States* v. *Gaither,* D.C. Cir. No. 23,636, decided February 12, 1971, slip op. at 3 n.1; *Wheeler* v. *United States,* 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied,* 333 U.S. 829 (1948).

The trial judge offered appellant's trial counsel the opportunity to argue to the jury his theory that appellant's possession of the pistol was mistaken, accidental or inadvertent within the meaning of the instruction.[6] These words are surely self-explanatory and need no elaboration. *United States* v. *Hardin,* D.C. Cir. No. 22,683, decided December 22, 1970, slip op. at 6; *Byrd* v. *United States,* 114 U.S. App. D.C. 117, 118, 312 F.2d 357, 358 (1962); *Byas* v. *United States,* 86 U.S. App. D.C. 309, 311-312, 182 F.2d 94, 96-97 (1950). Moreover, in *Arellanes* v. *United States,* 302 F.2d 603 (9th Cir. 1962), the same definition of possession was given as in the instant case, but the distinction of "knowing" from "mistaken, accidental or inadvertent" possession was apparently *not* given, as it was in the instant case.

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[5] This definition of "knowingly facilitating the concealment" of a narcotic drug applies to the second count of the indictment.

[6] See Tr. 184. Final arguments have not been transcribed, but surely appellant's trial counsel acted at his own risk if he failed to accept this offer.

The court nevertheless found the definition to be sufficient. 302 F.2d at 608-609 and n.8.

B. *Appellant's version, if believed by the jury, was a "satisfactory explanation" of his possession.*

Appellant's defense also fits squarely under another part of the instructions, a part to which he made no challenge at trial. The jury was charged that if appellant gave a satisfactory explanation of his possession, the evidence would not authorize them to find him guilty on the second count of the indictment:

> It is further provided by law that whenever on trial for a violation of this section, that is, the section relating to the Second Count, that the defendant is shown to have or to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction *unless the defendant explains the possession to the satisfaction of the jury.* This means that if the government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of the narcotic drug you may if you see fit to do so infer from the fact of such possession alone that the defendant is guilty of this offense. Unless the fact of such possession is explained to your satisfaction you are, however, not required to find the defendant guilty merely from the fact of such possession if you find he had possession but you may do so.
>
> Now it is exclusively within your province to determine whether the government has proved beyond a reasonable doubt by direct evidence that the defendant had possession of the narcotic drugs and if so *whether such possession has been explained to your satisfaction,* and if not, whether you will from these circumstances infer that the defendant is guilty of the offense charged. (Tr. 191) (emphasis added).

Thus the verdict must be deemed to reflect a finding by the jury that at least as to the second count of the indictment

appellant's explanation of possession was unsatisfactory.[7]

Appellee has found no case in which a court has examined the question of whether the "sufficient explanation" portion of 21 U.S.C. § 174 was inadequate from the point of view of an accused who felt that the section was not broad enough to cover his particular defense.[8] However, decisions on analogous jury instructions can be of some assistance. The "malice" instruction was discussed in *United States* v. *Hardin, supra,* where the jury was instructed that malice could be inferred from the use of a dangerous weapon "in the absence of explanatory or mitigating circumstances." This Court found the quoted phase self-explanatory.[9] In *United States* v. *Howard,* —— U.S. App. D.C. ——, 433 F.2d 505 (1970), this Court studied a similar instruction on the inference permissible from possession of recently stolen property if the "defendant's possession [of the property] has not been satisfactorily explained." The defense was innocent borrowing of the property. This Court found no necessity for an elaboration to the jury of the defendant's theory of the case and specifically rejected the contention that the words "satisfactorily explained" should have been defined for the jury.

In summary, the jury received a clear explanation of the

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[7] This finding by the jury, although it actually applies only to the second count of the indictment, renders harmless any error that might have arisen from the trial court's refusal to elaborate on appellant's theory that he did not have "knowing possession." Again we emphasize that appellant's only request of the trial judge was that he explain to the jury more fully the meaning of mistaken or accidental possession (Tr. 183).

[8] The reason for this may be that a charge to the jury that they may find a defendant guilty unless he gives them a "satisfactory explanation" of his conduct appears extremely defense-oriented. Conceivably such a charge might be misconstrued by a jury to mean that *any* reasonable explanation, even an inculpatory one, would necessitate a verdict of not guilty. It is small wonder that such an instruction would rarely come under attack from the defense bar.

[9] The Court declared:

> It is our position that the words *explanatory or mitigating circumstances* are self-explanatory and that, even though the court could have given a more detailed instruction *sua sponte* or pursuant to a request by the defense, failure to do so was certainly not prejudicial error. Slip op. at 5. (Emphasis in original.)

law, which presented them with alternative methods of arriving at a verdict in favor of appellant: (1) they might have found that his possession was not "knowing" but "mistaken, accidental or inadvertent," or (2) they might have found that his possession of the heroin was satisfactorily explained. Their verdict clearly reflects that they rejected both defenses.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES F. FLYNN,
Assistant United States Attorneys.

☆ U.S. Government Printing Office: 1971—422-729/601